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United States
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Circuit Court of Appeals

For the Ninth Circuit.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Attorneys of Record

HELLENTHAL & HELLENTHAL, Juneau, Alaska,
Attorneys for Defendant in Error,

RODEN & DAWES, Juneau, Alaska,
Attorneys for Defendant in Error.

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff herein complains of defendant, and for his cause of action alleges:

I.

That during all the time herein mentioned defendant was, and now is a corporation, organized, existing and doing business as such.

II.

That plaintiff now is and during all the time hereinafter mentioned was the owner of the lower or southwesterly one-half of Lot No. 2 in Block "N" of the townsite of Juneau, said premises being

situated on the upper or northeasterly side of Gastineau Avenue in the City of Juneau, Division No. One, Territory of Alaska, and plaintiff has been the owner as well as the occupant of said premises for several years last past; that continuously for several years last past and until the destruction of the said premises on the 2d day of January, 1920, as hereinafter more fully described, there was upon said premises a frame building belonging to and occupied by plaintiff and his family as a residence and rooming house, which building was, before and up to the time of its destruction as hereinafter described, of the actual and reasonable value of three thousand eight hundred dollars ($3,800.00); and that at the time of the destruction of said building, as hereinafter described, there were in said building and belonging to plaintiff, household furniture, household and kitchen utensils, sewing-machine, trunk, fishing gear, musical instruments, [1*] ornaments, personal jewelry, clothing, money and other personal property belonging to the plaintiff, all of the actual and reasonable value of three thousand twenty dollars ($3,020.00), all then and there in the possession of plaintiff.

III.

That said premises are situated on the Westerly slope of a steep and high mountain, generally known and described as Mount Roberts, and at an elevation of approximately 100 feet above the waters of Gastineau Channel; that the grade of the said slope

*Page-number appearing at foot of page of original certified Transcript of Record.

upon which said premises are situated, and from the lower side of said premises to the flume of said defendant company hereinafter described, is approximately 40 degrees from the horizontal; that said slope during all the time herein mentioned was covered with a heavy layer of soil, consisting principally of gravel, rocks, silt and decayed vegetable matter; that said soil was so composed and so situated on such slope that in case it became heavily saturated with water, or in case water in addition to the natural rainfall should be deposited upon the surface thereof, it would slide down hill and thus and thereby destroy the aforesaid frame building of plaintiff and everything therein contained: all of which facts above set out were at all times well known to defendant, its officers and agents.

IV.

That heretofore, and on or about the year 1914 or 1915, the defendant company, for its own benefit and for its own purposes, diverted a large quantity of the water of Gold Creek from its natural channel in Gold Creek Basin and conveyed the same to the westerly slope of Mount Roberts, and did so by conducting said water by means of a wooden flume or conduit through a tunnel through Mount Roberts and to a point on said slope directly above the plaintiff's premises above described and at an elevation of some 400 feet above the waters of Gastineau Channel and at an elevation of some 300 feet above the plaintiff's premises aforesaid. [2]

That the said use and diversion of said water by

defendant continued until after the 2d day of January, 1920, and the said tunnel, flume and conduit and all the means for the diversion and utilization of said water were constructed and installed by defendant, and during all the time herein mentioned and since the beginning of said diversion, said flume, tunnel, conduit, and all other means used in the diversion, conveyance, storing and utilization of said water, were operated and maintained exclusively by and were continuously in the exclusive possession, care, control and use of defendant, its agents and servants, until after the injury herein complained of.

V.

That the water so diverted by defendant, as above set out, on the 2d day of January, 1920, while this plaintiff was such owner and occupant of the premises aforementioned and in the possession of the same, either designedly on the part of the defendant company or by reason of defendant's negligence, escaped and flowed from said flume or conduit and was by the negligence of defendant, caused and permitted to be and become unlawfully deposited upon and to flow over and unto the said slope aforesaid, and over and upon plaintiff's said premises, and through and by the negligent or wilful acts of the defendant, said water, so diverted from Gold Creek flowed upon said slope, below said flume, and saturated the soil upon said slope, both above and underneath said building, and thereby and in that manner, and owing to the negligence and unlawful acts of defendant aforesaid, caused the said soil of

said slope and premises to slide down hill in the direction of Gastineau Channel, and thus and thereby destroyed the said premises belonging to plaintiff and completely demolished and destroyed the said frame building of plaintiff and all the aforementioned property within the said building, and thus and thereby rendered said premises, building and personal property absolutely worthless. [3]

VI.

That by reason of said facts above set out and by reason of the negligence and unlawful acts of the defendant, this plaintiff was damaged in the sum of six thousand eight hundred twenty dollars ($6,820.00).

WHEREFORE, the plaintiff demands judgment against defendant in the sum of six thousand eight hundred twenty dollars ($6,820.00), together with his costs and disbursements in this action.

JOHN RUSTGARD,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

John Larson, being first duly sworn, deposes and says: That he is the plaintiff above named; that he has heard read the foregoing complaint and knows the contents thereof, and that he verily believes the same to be true.

JOHN LARSON.

Subscribed and sworn to before me this 6th day of May, 1920.

[Notarial Seal] JOHN RUSTGARD,
Notary Public for Alaska.

My Commission expires October 8, 1922.

Filed in the District Court, District of Alaska, First Division. May 14, 1920. J. W. Bell, Clerk. By L. E. Spray, Deputy. [4]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1949-A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Bill of Particulars.

Comes now the plaintiff above named and, in response to the Court's order to submit a bill of the particular acts of design or negligence on the part of the defendant which he expects to prove upon the trial submits the following, and he alleges that at the trial of the above-entitled cause he expects to prove the following facts in addition to the facts set up in the complaint, to wit:

I.

That defendant's flume or conduit, described in the complaint, terminated at a penstock located on the slope described in the complaint and at an elevation of about 300 feet above the premises of plaintiff described in the complaint, from the bottom of which penstock extended a pipe, used and designed to convey and distribute the water to the places wanted by defendant for use, and which pipe will hereafter be referred to as the distribution pipe.

II.

That on the 2d day of January, 1920, the said penstock overflowed, for the reason that there was more water conveyed through said flume to the said penstock than was carried away from the penstock by the distribution pipe, or otherwise; that the water so overflowing said penstock is the water complained of in plaintiff's complaint and which caused the damage complained of therein. [5]

III.

That defendant, either negligently or designedly, on the said 2d day of January, 1920, prior to the injury complained of, permitted more water to flow into said flume and to be conveyed by said flume to said penstock than was taken away by the service pipe. That by constructing and maintaining a flume or conduit to confine and carry away to some safe place any water which at any time, for any reason, might be conveyed to the penstock in excess of what the service pipe would, could or

did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises here in question, or otherwise occasioned damage; that ordinary and reasonable care and caution on the part of defendant required of defendant that it should have constructed and maintained at all times such waste flume to carry away such waste water or surplus water, and defendant was negligent in failing to provide such precaution against injury from surplus or overflowing water at or near the penstock; that defendant was negligent in this, that it failed to provide and maintain a series of spillways along its said flume, by which spillways surplus water could and would be released from the flume before it reached the penstock; that the overflow water here in question, and which caused the damage herein complained of, was known to defendant to be so flowing, and likely to cause said damage, long prior to the occurrence of the slide complained of, or would, by the exercise of reasonable care on the part of defendant, have been so known by defendant long prior to the said slide and prior to any damage that would have been done by said water: and the said defendant was negligent in not shutting off said water and preventing the said overflow before any damage was occasioned thereby, and defendant, wrongfully and unlawfully, whether negligent or designedly, permitted said water to continue to flow upon the said premises until after the slide complained of had been caused and the

said damage had been done.

JOHN RUSTGARD,
Attorney for Plaintiff. [6]

United States of America,
Territory of Alaska,—ss.

John Rustgard, being first duly sworn, deposes and says: That he is the attorney for plaintiff in the above-entitled cause; that he had made personal investigation of the facts relating to plaintiff's cause of action and is personally as familiar with the facts set up in the foregoing bill of particulars as is plaintiff. That plaintiff is at present absent from the city of Juneau, and for that reason cannot verify personally this bill of particulars. That deponent believes the foregoing bill of particulars to be true, and he makes this verification on behalf of plaintiff, for the reason that plaintiff is absent from the city of Juneau and may not return to the city of Juneau for some considerable time to come and for that reason cannot personally make this verification.

JOHN RUSTGARD.

Subscribed and sworn to before me this 6th day of July, 1920.

[Notarial Seal] JOHN B. MARSHALL,
Notary Public for Alaska,

My Commission expires October 14, 1921.

Service of the foregoing bill of particulars admitted this July 7th, 1920.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. July 7, 1920. J. W. Bell, Clerk. By————, Deputy. [7]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1949-A

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Referring to paragraph I of the plaintiff's complaint the defendant admits that it now is and at all times in the complaint mentioned was a corporation organized, existing and doing business as such.

II.

Referring to the allegations of paragraph II of the complaint, the defendant avers that it has no knowledge sufficient to form a belief upon the question of whether the plaintiff was or is the owner of the premises mentioned in said paragraph, and defendant therefore denies that the plaintiff either was at the time stated or now is the owner thereof.

Defendant admits that there was at the time mentioned in the complaint a frame building on the premises described, but it avers that it has no knowledge or information sufficient to form a belief upon the question of whether such frame building was the property of the plaintiff and therefore the defendant denies that such building was the plaintiff's property.

The defendant further avers that it has no knowledge or information sufficient to form a belief as to what the actual or reasonable value of said building was, and therefore denies that it was worth the sum of thirty-eight ($3800) hundred dollars, or any other sum or sums whatsoever. The defendant avers that it has no knowledge or information sufficient [8] to form a belief upon the question of what articles of property were in said building at the time mentioned or as to whom such articles of property belonged, and defendant therefore denies that there was in said building belonging to the plaintiff, or otherwise, household furniture, or household and kitchen utensils, or a sewing-machine, or a trunk, or fishing gear, or musical instruments, or ornaments, or personal jewelry, or clothing or money or other personal property whatsoever belonging to the plaintiff, and defendant further avers that it has no knowledge sufficient to form a belief upon the question of what was the value of the articles of property mentioned above, and defendant therefore denies that the same were of the actual or reasonable value of

three thousand and twenty ($3,020) dollars, or of any other sum or sums whatsoever.

III.

Referring to the allegations of paragraph III of the complaint, the defendant admits that the premises referred to are situated on the westerly slope of a steep and high mountain, generally known as Mount Roberts, at an elevation of approximately 100 feet above the waters of Gastineau Channel, but denies that the grade of said slope at the place indicated in said paragraph is 40° from the horizontal, and avers that the grade of said slope at the place indicated is approximately 30° from the horizontal. The defendant denies that said slope is covered with a heavy layer of soil consisting principally of gravel, rocks, silt and decayed vegetable matter, but avers in this connection that with the exception of the ravines and gulches and other places where the soil has washed away, the slope of said mountain is covered with a clayey soil mixed with rocks and boulders. Defendant denies that the soil on said mountain was or is so composed, or so situated, that in case it became or becomes heavily saturated with water, or in case water in addition to the natural rainfall, were or should be deposited upon the surface thereof, it would slide downhill, either so as to destroy the buildings referred to and the articles of property therein contained or otherwise, and in [9] this connection the defendant avers that the soil on said mountainside was at rest at the natural angle of repose in a

position occupied by it for a long period of time and that saturation however caused would not cause it to slide unless the angle of repose had been first changed by the making of excavations or otherwise, and in this connection defendant further avers that neither it nor its officers nor agents, ever had any knowledge to the effect that said soil deposits would slide if the same became saturated, but, on the contrary, knew the facts to be as hereinbefore stated.

IV.

Referring to the allegations of paragraph IV, the defendant admits that it diverted and applied to use for its own benefit and for its own purposes a portion of the waters of Gold Creek, but avers that said appropriation was not made in 1914 or 1915, but in the year 1910. The defendant admits that the waters so diverted were conducted by means of a flume line consisting in part of wooden flume and in part of a conduit through a series of tunnels in Mount Roberts, and that in conducting said waters through said flume and ditch line, the same passed over and above the premises described therein as the premises of the plaintiff, at an elevation of some four hundred feet above the waters of Gastineau Channel and at an elevation of about three hundred feet above the premises so designated as plaintiff's premises. In this connection the defendant avers that the facts in relation to the said appropriation of water and its application to use by

the defendant are more specifically set forth elsewhere in this answer.

V.

Referring to the allegations of paragraph V of the plaintiff's complaint, the defendant denies that the water so diverted by it, or any other water in its possession or under its control, did on the 2d day of January, 1920, or at any other time, while the plaintiff was the owner or occupant or in the possession of the premises referred to, or any other time, either because of design on the part of the defendant or because [10] of its negligence, or at all, escaped from or flowed from said flume or conduit, and defendant denies that such water or any other water was, by its negligence, or by its acts whether negligent or otherwise, caused or permitted to be unlawfully or otherwise deposited upon or to flow over or on to the slope of Mount Roberts, or upon the plaintiff's premises, or the premises described as the plaintiff's premises, or any other place or places whatsoever, and defendant denies that through or by the negligent or wilful acts or any other acts of the defendant whatsoever, said waters so diverted from Gold Creek, or any other water or waters under its control, flowed upon said slope below said flume or elsewhere, and defendant denies that such waters saturated the soil upon said slope either above or underneath the buildings referred to, and either in that manner or any other manner owing to the negligent and unlawful acts of the defend-

ant, or any other act or acts of the defendant whatsoever, causing the said soil situated on said slope or premises to slide down hill in the direction of Gastineau Channel or at all. The defendant denies that in the manner mentioned the premises referred to as belonging to the plaintiff were completely demolished and destroyed, or demolished and destroyed at all. Defendant denies that said frame building described as belonging to the plaintiff and the other property mentioned in said paragraph as being within said building were in the manner mentioned, or at all, demolished or destroyed; denies that the same were rendered absolutely worthless, or in any degree rendered worthless. In this connection the defendant avers that a landslide occurred on the slope of Mount Roberts at the time mentioned, as is hereinafter more specifically set forth, but defendant denies that it was caused either directly or indirectly by any negligent or other act of this defendant, and defendant avers in this connection that no water flowed from its penstock, flume line, or ditch line, or from any other device or devices in its possession, or under its control prior to the time that said land slide took place, and in this connection avers that the facts in relation to said land slide, as well as other matters and things therein [11] referred to, are more specifically set forth elsewhere in this answer.

VI.

Referring to the allegations of paragraph VI of

the plaintiff's complaint, the defendant denies that by reason of the facts set forth and that by reason of any negligence or unlawful acts of the defendant, or by reason of any act or acts on the part of the defendant whatsoever, the plaintiff was damaged in the sum of six thousand eight hundred and twenty ($6,820) dollars, or in any other sum or sums whatsoever.

Referring to the bill of particulars filed herein, and for answer to the matters and things therein alleged, the defendant admits, denies and alleges as follows:

I.

Referring to paragraph I of said bill of particulars the defendant admits that its flume terminated at a penstock located on the slope of Mount Roberts, which was situated at about the elevation referred to in the bill of particulars, but denies that the water coming to said penstock was distributed by a single pipe, and avers, on the contrary, that three pipes led from said penstock to three different places of use. One of these pipes was owned and controlled solely by the City of Juneau, a municipal corporation, and maintained by it in connection with its water system used for the purpose of extinguishing fires. Another pipe was connected with the power plant of the defendant so as to supply water for use in connection with its operation, and a third pipe was connected with the mill of the defendant to supply water for use in connection with the operations there carried on.

II.

Referring to paragraph II of said bill of particulars, the defendant denies that on January 2d, 1920, or at any other time or times, the said penstock overflowed, either for the reason that there was more water conveyed through the flume to the said penstock than was carried away from the penstock by the distribution pipe or pipes or otherwise, or for any other reason or reasons whatsoever. And the defendant further [12] denies that any water overflowing from said penstock at the time mentioned, or at any other time, was the cause of any damage complained of in the complaint, or any other damage whatsoever.

III.

Referring to paragraph III of the said bill of particulars, the defendant denies that it either negligently or designedly, or at all, on the 2d day of January, 1920, prior to the injury complained of, or at any other time or times, permitted more water to flow into its flume and to be conveyed by its said flume to its said penstock, than was taken away by the service pipe or pipes.

The defendant denies that the construction or maintenance of a flume or conduit to confine or carry away to some safe place, or otherwise, any water which, at any time for any reason, might be conveyed to the penstock in excess than what the service pipe would, could, or did carry, could serve any purpose in carrying away water that could, or would, at any time, overflow because of being carried to the penstock. And defendant denies that ordi-

nary or reasonable care or caution, or any other degree of care or caution on the part of the defendant, required it to construct or maintain at any time, such waste flume, or any flume, to carry away such waste water or surplus water, or any other water whatsoever; and defendant denies that it was negligent in failing to provide such precaution, or any other precaution, against injury from surplus or overflowing water, or any other kind of water, at or near its penstock or elsewhere, and in this connection the defendant avers that its penstock, flume and distribution pipes were installed in accordance with the best engineering practice, and were so installed that no person could anticipate any overflow of water, either from the flume or penstock, at the point mentioned, or elsewhere, and would have no reason to expect such overflow to occur.

The defendant denies that it had any knowledge at any time of any overflow water which caused the damage referred to in the plaintiff's complaint; denies that any water did overflow and cause such damage, [13] or any other damage whatsoever; denies that there was any reason for the defendant to suspect that any water would so overflow; denies that it had any such knowledge, either long prior to the occurrence of the slide referred to, or at any other time, or at all. Denies that, by the exercise of reasonable care, or any other degree of care, it would, or could have known that water was overflowing at the point referred to in said bill of particulars, or elsewhere, and denies that any water

was so overflowing; denies that the defendant was negligent in not shutting off said water, or any other water under its control; denies that the defendant was negligent in not preventing said overflow, or any other overflow, before damage was occasioned, or otherwise; denies that the defendant unlawfully, wrongfully, or at all, negligently, designedly or at all, permitted said water to continue to flow upon said premises until after the slide complained of had been caused, or at all, and until after said damage had been done, or at all, and in this connection the defendant avers that no water whatsoever overflowed from its said penstock, or flume, or any other contrivance under its control prior to the time that the slide on the side of Mount Roberts referred to in the complaint, took place; and denies that said slide was caused either in whole or in part by any water or waters coming from the defendant's penstock or flume, either as alleged in said complaint and bill of particulars, or otherwise.

And the defendant further answering AVERS:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, authorized to do and doing business in the Territory of Alaska, at and near Juneau; that the defendant has fully complied with the laws of the Territory of Alaska as to the domestication of foreign corporations, and has paid the annual license *tas* due the Territory of Alaska, January 1st, 1921.

II.

That it is engaged in the business of operating a mine situate some distance behind the town of Juneau in the Silver Bow Basin, and generally known as the Alaska Juneau Mine. That it operates a milling [14] plant, for the reduction of the ores mined at its said mine, on the slope of Mount Roberts along the shore of Gastineau Channel. That in connection with the operation of its said milling plant, it has diverted some of the waters of Gold Creek and has conduits extending along the side of Mount Roberts and through a series of tunnels driven along the course of said flume. That, at a point above the premises referred to in the complaint and described as the premises of plaintiff, the waters carried by the flume are discharged into a penstock from which the same are distributed by means of distribution pipes to the places of use. One pipe, which belongs to and is maintained by the City of Juneau, leads to the water-mains of the City of Juneau so as to make the water available for fire fighting purposes, another pipe leads to the power plant of the defendant where such portion of the waters as carried by said pipe are applied to use in the generation of electric power. The third pipe is of large dimension and taps said penstock above the other two, and conveys all the water coming to said penstock not flowing through the other two pipes to defendant's milling plant where the same is applied to use. That said appliances are so constructed that said penstock cannot overflow, and said flume and penstock, distribution pipes, and all

other contrivances used in connection with modern engineering, and the same were, each and all, installed and maintained with the highest degree of care and engineering skill.

That, in order to prevent leaves, moss and other kinds of debris, from entering the distribution pipes, and occasioning interference or inconvenience in connection with the operation of machines fed by such pipes, either directly or indirectly, it was necessary and imperative that a screen should be so installed as to take from the water coming into said penstock, the moss, leaves and other debris, and for that purpose a revolving screen was placed at the opening of said flume in such a manner that the water coming therefrom would flow through said revolving screen and the moss, leaves and other debris would be separated therefrom and carried by said screen through a spout installed for said purpose, to the outside of the penstock above [15] referred to. That the waters of Gold Creek are generally quite clear but do, on occasions, for one reason or another, contain moss, leaves and debris in sufficient quantity that the meshes of a stationary screen might become clogged and that, in order to overcome this difficulty, the revolving screen as aforesaid was installed, which was at all times kept revolving in such a manner as to keep itself clean from moss, leaves and other forms of debris, and permit the free and unobstructed passage of the water through it. That in order to accomplish this purpose, an electric motor was installed, which was supplied and driven with, and by, a current coming

from the electrical system maintained by the defendant. That said motor would continue to keep said screen revolving, and, in that manner, to keep the meshes thereof from becoming clogged so as to allow the water to pass through the same freely, and that all the devices so installed were of the most approved type, and in all respects, sufficient for the purposes for which the same were designed, and were installed and maintained in accordance with the highest degree of care, foresight and engineering skill.

III.

That on January 2d, 1920, a slide occurred on the slope referred to in the complaint.

IV.

That the Alaska Gastineau Gold Mining Company maintained a tower on the area that formed part of the general mass that slid down the mountain side on the occasion referred to, and that high tension wires, owned and controlled by the last-mentioned corporation, were fastened to said tower, it forming a part of its general pole line on which wires were stretched to convey electric current. That the wires so designed to carry electric current, and owned and controlled by the said Alaska Gastineau Gold Mining Company, were in close proximity to a line of poles supplied with similar wires designed for like uses, and owned and controlled by the [16] defendant company and others associated with it in that regard, and, at a point immediately to the southeast of where said landslide occurred, the wires of said Gastineau Company crossed the wires of the

defendant and its said associates. That when said landslide took place, the said tower of the said Gastineau Company situated on the slide mass, as above stated, was disturbed with a result that the wires of the said Gastineau Company and those of the defendant and its associates, were brought in close enough contact to cause a short circuit on the defendant's plant, including the motor designed and installed to drive the revolving screen above referred to, were stopped so that said revolving screen came to a standstill as a result of the slide aforesaid.

V.

That a short time prior thereto, another and different landslide occurred on the northerly slope of Mount Roberts in the vicinity of Wood's Gulch, which said landslide came from a point high up on the slope of said mountain, and was such that it could not be anticipated or foreseen, and consisted of a quantity of *quantity of* gravel and soil that slid down the side of the mountain, and in coming in contact with the flume and *and* diverting works of the defendant situate at Wood's Gulch, so damaged the same and interfered with their operation, that a considerable quantity of surface water carrying moss, leaves and other forms of debris coming from the side of Mount Roberts at that point, found its way into the North Portal of what is known as No. 3 Tunnel, and thence into the flume of the defendant hereinbefore referred to. That said landslide occurred just immediately prior to the landslide referred to in the complaint, and that steps were immediately taken by the defendant to over-

come the effect thereof, but that some of the debris consisting of leaves, moss and other loose materials lying on the surface of the mountain, had, notwithstanding the highest degree of vigilance exercised by the defendant, found its way into the flume as aforesaid, and that, by reason thereof and because of the unusual rains that had fallen immediately prior to the time of the slide referred to, the water coming from the flume and passing through said revolving screen, was highly charged with leaves, moss and other surface debris so that when [17] the revolving screen came to a stop, as hereinbefore stated, the meshes thereof were quickly filled with debris so as to cause the waters coming from the flume to, in part, flow over said screen instead of through the same, and find their way through the discharge spout installed and designed for the purpose of enabling the trommel screen to discharge the moss and debris taken from the water, to the outside of the penstock, as hereinbefore stated. That said water did not come from said spout designed to carry away the debris taken from the water by the screen, until after the screen had stopped and the meshes thereof had become clogged as above stated, all of which was due directly to the movement of the slide mass and the consequent interference with the electrical current supplying the motor by which said revolving screen was driven, which said slide was an act of God over which the defendant had no control, and which the defendant could not, by the exercise of any degree of foresight, have anticipated or foreseen.

That the waters so coming from said appliances of the defendant, did not, in any wise, occasion said slide, were not the cause thereof, either in whole or in part, and were not due to any negligence of the defendant, but occasioned as aforesaid, by causes beyond its control, and which were such that it could not foresee their occurrence.

And the defendant further answering, and by way of affirmative defense, AVERS:

I.

That the deposits of earth on the side of Mount Roberts at, and in the vicinity where the slide herein referred to occurred, were, and had been, for many years, in a state of rest and were so situated that, unless disturbed or undermined, the same would remain in the position occupied by them on the mountain side, in the absence of unusual, natural occurrences.

II.

That on the second day of January, 1920, and for a long time prior thereto, one Peter Koski, and his predecessors in interest, occupied a plot of ground on the slope of Mount Roberts immediately above the premises referred to in the complaint as the premises occupied by the plaintiff; that [18] the said Koski and his said predecessors in interest, as well as his and their agents, servants and employees, made an excavation on the premises occupied by them and cut away a portion of the soil situate on the slope of Mount Roberts at that point in such a manner as to deprive the soil mass lying above said excavation and cut of its adjacent support so as to

enable it to slide down the mountain side and that the soil mass lying immediately above said cut and excavation so made and maintained was the mass that slid and formed the land slide referred to in the complaint.

That the said Peter Koski and his predecessors before him failed to place any bulkhead or bulkheads, or any protection whatsoever in said cut or excavation at the point where the natural slope of the hill had been so changed, or at all, but on the contrary, negligently made such excavation so as to remove the subjacent support from the mass lying above the same, and negligently failed to construct bulkheads or other structures with a view of supporting the mass from which the subjacent support had been so taken; and that the said Koski at all times in these pleadings mentioned, so negligently maintained said excavation, and so negligently failed to take any steps whatsoever to protect himself from landslides, or to support said mass by means of a bulkhead or otherwise, or in any wise to supply any kind of device or devices whatsoever that would prevent said mass from sliding, and negligently failed to take any steps to retard or oppose the action of natural laws in establishing the equilibrium of the soil mass on the mountain side disturbed by the making of such cut or excavation.

That on the said 2d day of January, 1920, said mass having become saturated with water, which said saturation resulted solely and entirely from natural causes, to wit, unusually heavy rains and melting snows, was absorbed by said mass until it

becamse saturated and heavy, and it, having no support, its subjacent support having been taken away and removed by the said Koski and others connected with him as aforesaid, and no effort having been made to supply support by artificial means, thereupon slid down the mountain side, the mass so sliding being coextensive with the excavation made as aforesaid. That the making and the maintaining of said excavation, and the removal and consequent absence of the subjacent support that the [19] hillside mass formerly had in its natural state, as well as the negligence of said Koski in failing to construct a bulkhead or other similar devices as aforesaid, were the sole cause of the slide above mentioned and referred to in the complaint.

WHEREFORE, the defendant prays that this plaintiff's complaint be dismissed, and that the plaintiff receive nothing by reason thereof, and that the defendant have judgment against the plaintiff for its costs and disbursements in its behalf incurred.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

P. R. Bradley, being first duly sworn, on oath deposes and says: That he is the agent and general manager of the defendant corporation; that he has read the foregoing answer and knows the

contents thereof and that the facts therein stated are true as he verily believes.

P. R. BRADLEY,

Subscribed and sworn to before me this 18th day of March, 1921.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My Commission expires Dec. 15, 1921.

Copy received and service admitted March 18th, 1921.

HENRY RODEN,
Of Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Mar. 18, 1921. J. W. Bell, Clerk. By V. F. Pugh, Deputy. [20]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Reply.

Comes now the plaintiff and for reply to defendant's answer herein denies and alleges as follows, to wit:

I.

Replying to defendant's "further answer" plaintiff denies that the appliances mentioned in Paragraph II thereof are so constructed that the penstock cannot overflow, denies that the appliances in said paragraph mentioned were installed and maintained with the highest degree of care and engineering skill, but alleges the fact to be that said penstock, screen and appliances were installed and maintained in a careless and negligent manner as set forth in the complaint filed herein.

Denies each and every material allegation, matter and thing contained in paragraph IV of said "further answer" and the whole thereof.

Denies each and every material allegation, matter and thing contained in paragraph V of said "further answer," and especially denies that a slide occurred at Wood's Gulch as in said paragraph alleged and especially denies that the slide complained of was caused by an act of God, and in that connection plaintiff alleges that the slide complained of and the damage to plaintiff as in the complaint alleged and set forth was caused by the negligence of the defendant as in said complaint alleged and was caused solely by the water escaping from defendant's appliances.

II.

Replying to defendant's further answer "by way of affirmative [21] defense" plaintiff denies that Peter Koski, deceased, and his predecessors in interest, or Peter Koski or his predecessors, or any other person, or at all, made any excavation

in or cut away any portion of the soil situate on the slope of Mount Roberts at a point mentioned and described in paragraph II of said affirmative defense, or at any other point or at all; denies that said Peter Koski, deceased, or any other person, did any act or thing whatsoever which deprived any soil mass of its support and denies that the soil mass that slid and formed the slide in said paragraph referred to was situate immediately above the premises in said paragraph described; but alleges the fact to be that the mass which slid came from a point somewhat higher on the mountain side than the premises occupied by Peter Koski, deceased, or his predecessors in interest.

Plaintiff denies that unusually heavy rains caused the mass of earth in said paragraph described to become saturated with water and that such saturation resulted from natural causes, but alleges the fact to be that such saturation was caused solely and exclusively by a large volume of water poured upon said mass and discharged from the penstock of defendant, as alleged in plaintiff's complaint, and bill of particulars; denies that said mass slid down on account of any act done or left undone by said Peter Koski, or his predecessors in interest or by any other person, except by the negligent act of defendant in maintaining its flume and penstock as set forth in plaintiff's complaint, and bill of particulars; denies that the failure of said Koski or the failure of any other person to construct a bulkhead was the sole

cause or any cause of the slide referred to, and denies that the said Koski or any other person was negligent in any way or manner whatsoever, and alleges that no act, either of commission or omission, on the part of the said Koski or on the part of any other person, in any way, manner or form caused the said slide or contributed to the cause thereof.

Further answering the said affirmative defense plaintiff denies that the slide or damage complained of was caused by any negligent act of the said Koski or of his predecessors or any other person, or by the combination of all or any of the acts or occurrences mentioned in paragraph II of said [22] affirmative defense; denies that any of the acts, conditions and cicumstances referred to in said paragraph caused, severally or collectively, or severally or collectively, the said slide or damage complained of, and denies that any of the acts, conditions or circumstances referred to in said paragraph II contributed in any manner whatsoever severally or collectively, or severally or collectively, to cause said slide or damage complained of, and plaintifl alleges that the said slide and damage by him complained of was caused as set forth in his complaint filed and bill of particulars; herein and in no other manner.

WHEREFORE, plaintiff prays judgment as in his complaint.

RODEN & DAWES,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

John Larson, being first duly sworn, on his oath deposes and says: I am the plaintiff in the above-entitled action; I have read the foregoing reply, know the contents thereof and the same is true as I verily believe.

JOHN LARSON.

Subscribed and sworn to before me this 21st day of April, 1921.

[Notarial Seal] HENRY RODEN,
Notary Public, Territory of Alaska.

My commission expires July 24, 1922.

Copy received and service admitted this 21st day of April, 1921.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. Apr. 22, 1921. J. W. Bell, Clerk. By ————, Deputy. [23]

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ————, Deputy.

Filed and presented this July 13, 21.

ROBERT W. JENNINGS,
Judge.

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

In the Matter of JOHN LARSON

vs.

ALASKA JUNEAU GOLD MINING COMPANY.

Bill of Exceptions.

BE IT REMEMBERED that this cause came on regularly for trial before the Honorable Robert W. Jennings, Judge of the above-entitled court on the 20th day of April, 1921; that both parties were present and duly represented by counsel, Henry Roden acting as counsel for the plaintiff, and Hellenthal & Hellenthal as counsel for the defendant, whereupon a jury was duly selected, impanelled and sworn, and the cause duly proceeded to trial before the Court and jury so selected; thereafter both plaintiff and defendant called witnesses, and evidence was regularly adduced, which said evidence so adduced was sufficient to sustain the verdict of the jury upon all matters submitted to them other than the question of the extent of the injuries sustained, and the amount of the damage sustained, by reason of the matters and things referred to in the complaint; that the plaintiff called as a witness JOHN LARSON, who, being duly sworn, on oath testified in answer to questions as follows:

Testimony of John Larson, for Plaintiff.

Direct Examination.

(By Mr. RODEN.)

Q. What is your name? A. John Larson.

Q. Where do you live, John?

A. I live in Juneau. [24]

Q. How long have you lived in Juneau?

A. About 9 years.

Q. Are you the man that brought this lawsuit we are trying now? A. Yes.

Q. What has been your business since you have been in Juneau? A. Common laborer.

Q. Where do you live?

A. I live on Gastineau Avenue.

Q. You did live there—on what lot did you live there? A. No. 2.

Q. Do you know what block it is in?

A. Small n.

Q. Block n. How long have you lived there, John?

A. I have lived there since the spring of 1913.

Q. Did you buy that lot? A. Yes.

Q. From whom? A. From John Lund.

Mr. RODEN.—Will it be all right, Mr. Hellenthal, if I do not prove the trustee's title?

Mr. HELLENTHAL.—I don't care about the trustee's title. The only thing I want Mr. Larson to show is the title from John Lund to himself.

Q. You bought it from John Lund? A. Yes.

(Testimony of John Larson.)

Q. Did you buy that property yourself, or did somebody else buy it?

Mr. HELLENTHAL.—Of course I will object to the testimony as not the best evidence, unless it is preliminary.

Mr. RODEN.—It is merely preliminary.

Mr. HELLENTHAL.—Then I have no objection to it. [25]

A. I bought it myself.

Q. In whose name was the deed taken?

A. It was in my wife's name.

Q. What was your wife's name?

A. Mary Larson.

Q. Your wife is dead, isn't she?

A. She is dead.

Q. When did she die? A. She died in 1918.

Mr. RODEN.—Now, may it please the Court, we desire to introduce in evidence a deed from John Lund to Mary Larson. I might state to the Court that I discovered a day or two ago that the record title stands, not in the plaintiff, but the record title stands in the name of Mary Larson, now deceased, so I take it that all that Mr. Larson can recover for would be for his life estate—estate by curtesy—as far as the real property is concerned, anyhow. I did not know this. Of course, as the Court knows, I did not commence this suit—I did not know until I began to question Mr. Larson recently when I was preparing to prove his title.

Mr. HELLENTHAL.—I will not object to that

(Testimony of John Larson.)

deed if it is part of the chain of title—if it is part of the chain of title from Mr. Lund to the plaintiff I have no objection to the deed.

Mr. RODEN.—This is the only title, as far as Mr. Larson is concerned. I want to ask him a few preliminary questions first about it.

Q. Who was Mary Larson?

A. She was my wife.

Q. When were you married, Mr. Larson?

A. I was married in the spring of 1912. [26]

Q. Where? A. Here in Juneau.

Q. Before whom? A. I didn't hear.

Q. Where were you married—in the courthouse before the Judge, or in the church?

A. No, in the church.

Q. Do you remember who the minister was?

A. Yes, it was a Swedish minister.

Q. What was his name? A. His name was—

Q. Have you got the marriage certificate, John?

A. Yes, I had it.

Q. Where is it now? A. I lost it in the slide.

Q. When did your wife die?

A. She died in 1918, in the fall.

Q. Any children? A. Yes.

Q. How many? A. One.

Q. One child. Did your wife leave a will? Do you know what I mean by a will? A. No.

Q. What I mean is, did your wife leave a paper in which she said what should become of the property in case she died before you died or before the child died?

(Testimony of John Larson.)

A. I didn't have no chance to see her—she was sick.

Q. Where did she die?

A. She died in the hospital.

Q. Where—here? A. Yes. [27]

Q. Where were you at the time?

A. I was at home.

Q. That is, in your house here? A. Yes.

Q. That is, you mean you were not just present at the moment your wife died? A. Yes.

Q. But you and your wife had lived together up to the time that she was taken to the hospital.

A. Yes.

Q. Lived together as husband and wife?

A. Yes.

Q. No trouble of any kind? A. No.

Q. Have you ever found any paper in which your wife said what should become of any property that she had, in case she died? A. No.

Q. Not that you know of? A. No.

Mr. RODEN.—Now, if the Court please, we desire to introduce in evidence a deed from John Lund to Mary Larson, the wife of this plaintiff.

Mr. HELLENTHAL.—The deed is immaterial unless it is part of the chain of title.

The COURT.—It must be part of the chain of title—to show his interest—his ownership, in some way or other, is it not?

Mr. RODEN.—I take it that the only way I can show it, this puts the title in his wife, and his wife died.

The COURT.—He has other title that came from his wife? [28]

Mr. RODEN.—Yes, sir.

The COURT.—Very well—that is a part of the foundation of your suit—of your right.

Whereupon said deed was received in evidence, marked Plaintiff's Exhibit "N," and is in words and figures as follows, to wit:

Plaintiff's Exhibit "N."

"THIS INDENTURE, made this 14th day of April, in the year of our Lord One thousand nine hundred and thirteen (1913) BETWEEN John Lund and Carolina Lund, wife of said John Lund, both of Juneau, Alaska, parties of the first part, and Mrs. Mary Larson, of the same place, party of the second part:

WITNESSETH, That the said parties of the first part for and in consideration of the sum of Twelve Hundred and no/100 Dollars Lawful Money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents Grant, Bargain, Sell, Convey and Confirm unto the said party of the second part, and to her heirs and assigns, the following described tract, lot or parcel of land, situate, lying and being in the City of Juneau, Alaska, particularly bounded and described as follows, to wit:

ALL of Lot numbered two (2) in Fractional Block 'n' (little n), according to the official plat of said City of Juneau, Alaska, made by G. W. Gar-

side, U. S. Surveyor, and approved by the Trustee of the townsite of said Juneau, Alaska.

TOGETHER with the appurtenances, to have and to hold the said premises, with the appurtenances, unto said party of the second part and to her heirs and assigns forever.

And the said parties of the first part, their *heis,* executors and administrators, do by these presents, covenant, grant and agree to and with the said party of the second part, *heir* heirs and assigns, that they, the said parties of the first part, their heirs, executors and administrators, all and singular, the premises hereinabove conveyed, described and granted, or mentioned, with the appurtenances, unto the said party of the second part, her heirs and assigns, and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will WARRANT and forever DEFEND.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals [29] the day and year first above written.

JOHN LUND.
CAROLINA LUND.

Signed, sealed and delivered, in the presence of
ED. C. RUSSELL.
EARLE C. JAMESON.

United States of America,
District of Alaska,—ss.

THIS IS TO CERTIFY, that on this 14th day of April A. D. 1913, before me, the undersigned, a

Notary Public in and for the District of Alaska, duly commissioned and sworn, personally came John Lund and Carolina Lund to me known to be the individuals described in and who executed the within instrument, and each acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

And the said Carolina Lund, wife of said John Lund upon an examination by me separate and apart from her said husband, when the contents of said instrument were by me fully made known unto her, and she was by me fully appraised of her rights and the effect of signing the within instrument, did freely voluntarily, separate and apart from her said husband, acknowledge the same, acknowledging that she did, voluntarily of her own free will and without the fear of or coercion from her husband, execute the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal, the day and year in this certificate first above written.

[Notary Seal] JOHN G. HEID,
Notary Public in and for Alaska, Residing at Juneau, Alaska.

Filed for record at 2 o'clock P. M., May 19, 1913, in Book 24 of deeds, page 19.

G. C. WINN,
District Recorder. [30]

(Testimony of John Larson.)

Q. How old a man are you, Mr. Larson?

A. 38.

Q. How long have you been in the United States?

A. 19 or 20 years.

Q. Are you an American citizen? A. Yes.

Q. How is your health? A. Oh, pretty good.

Q. Have you ever suffered from any serious disease or ailment? A. No.

Q. Where were you on the 2d day of January, 1920, John? A. I was in my house.

The COURT.—Just a moment before you go any further. Do you propose to establish title to any greater extent than you have already done?

Mr. RODEN.—Not in the real estate, your Honor, I cannot.

The COURT.—What are you suing for—loss of the real estate, and what else?

Mr. RODEN.—And the personal property in the house, and cash money—the personal property of this defendant.

The COURT.—All right.

Q. That is, you were in the house that you have just mentioned? A. Yes, sir.

Q. That was on lot 2, block n, was it?

A. Yes.

Q. What kind of a house did you have there?

A. I had three stories—four floors.

Mr. HELLENTHALL.—We object to that testimony if it is to prove this man's ownership of the house, as not the best [31] evidence.

The COURT.—Of course that does not prove

(Testimony of John Larson.)

ownership—he just asked him what kind of a house he had there.

Mr. HELLENTHAL.—He said, "What kind of a house did you have there?" It is all right for him to testify what kind of a house was on the lot.

The COURT.—What was your question?

Mr. RODEN.—I asked him what kind of a house he had there. Of course under the allegations of the complaint as it is, he has a right to show his life estate—his right by curtesy. That is the only thing I can see Mr. Rustgard could have thought about when he commenced the suit without having an administrator appointed for Mrs. Larson. I cannot see any other theory.

The COURT.—Are you trying this case on what Mr. Rustgard thought?

Mr. RODEN.—I have to try the case the way I find it, your Honor,—I didn't know anything about this title.

The COURT.—We can obviate that question. Ask him what kind of a house there was on the property, and then I can pass on the whole thing after awhile.

Mr. RODEN.—I think that would be immaterial, until the title to the property itself is established. The house would be appertenant to the lot.

The COURT.—I do not know whether it would or not.

Mr. HELLENTHAL.—Of course there might be conditions under which it would not.

(Testimony of John Larson.)

The COURT.—He may answer that question, what kind of a house was on the lot.

Q. (By Mr. RODEN.) Describe that house, John, when you first went on to this property. [32]

A. It was only a five-room house.

Q. How big was the house?

A. It was—you mean *n*ow long and how wide?

Q. Yes.

A. It was about 39 feet long and 24 feet wide.

Q. Was it more than one-story high?

A. At first it was just one story.

Q. Just one story high? A. One story.

Q. What did you pay for that property?

A. First I paid $1200.

Mr. HELLENTHAL.—It is immaterial what he paid for it, if it wasn't his property.

The COURT.—It is immaterial anyhow—the question is, what was the value of it?

Mr. RODEN.—Sure. Then what did you do, if anything, in the way of improving this house?

A. I want to rebuild there.

Q. Just tell the Court and jury what you did do in the way of rebuilding the house.

A. I went and I raised it up two or three feet, then I put a new foundation, then I put another story on top of it, and then I put three rooms in the basement there.

Q. That practically became, then, a three-story house, did it? A. Three stories; yes.

(Testimony of John Larson.)

Q. How much money did you pay for having these changes made?

Mr. HELLENTHAL.—We object to that as immaterial.

The COURT.—Objection sustained.

Q. Who paid for doing this work?

Mr. HELLENTHAL.—I object to that as immaterial.

The COURT.—Objection sustained. [33]

Q. Who paid for doing this work?

Mr. HELLENTHAL.—I object to that as immaterial.

The COURT.—Objection is sustained.

Q. What was in the house, John, in the way of furniture? A. Furniture was in there.

Q. Have you got a list of the stuff you had in there? A. Yes.

Q. All right, you may use that list and tell us what was in there.

A. One range stove, hot water connection, $70.00.

The COURT.—If he has a list of it, just submit the list.

Q. Have you a list there? A. Yes.

Q. Is that a true statement, what you have got there, of what was in the house? A. Yes.

Q. On the day of the slide? A. Yes.

Q. Who did that property belong to that was in the house there?

Mr. HELLENTHAL.—That is the personal property?

Mr. RODEN.—The personal property, yes,—who

(Testimony of John Larson.)

did that belong to? A. It belongs to me.

Mr. RODEN.—It belonged to you. All right. We desire to introduce in evidence this list of personal property that was upon the premises.

The COURT.—It is attached to the complaint?

Mr. RODEN.—No, your Honor, but I understand counsel asked for a bill of particulars and that is the bill of particulars. [34]

Mr. HELLENTHAL.—It goes in evidence only to the extent of being an enumeration of the property. The list also contains the valuation of each article—we do not object to that, of course.

The COURT.—Fix the valuation so the whole thing may go in, Mr. Roden.

Mr. RODEN.—What is the total value of the property, do you know, John?

A. I cannot say.

Q. That is the total there, I guess.

A. $3031.00.

Whereupon said bill of particulars was received in evidence, marked Plaintiff's Exhibit "O," and is in form and figures as follows, to wit:

Plaintiff's Exhibit "O."

"In the District Court for the District of Alaska,
Division Number One, at Juneau.
Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

BILL OF PARTICULARS.

COMES NOW the plaintiff above named and, in response to the request for a bill of particular items of personal property claimed by him in his complaint to have been destroyed and for which destruction he seeks to recover damages from defendant, submits the following: [35]

BILL OF PARTICULARS.

1 range, hot-water connections	$70.00
1 range	60.00
3 heaters	31.00
3 full size bedsteads and bedding	210.00
7 three-quarter size bedsteads and bedding	420.00
5 dressers or bureaus	75.00
1 dresser or bureau	20.00
4 center tables	16.00
1 kitchen table	10.00

5 kitchen chairs	13.50
19 chairs	57.00
1 rocking chair	7.00
1 rocking chair	10.00
1 couch	16.00
1 couch	14.00
Cooking utensils	15.00
Plated dishes, etc.	25.00
1 doz. silver plated teaspoons	6.00
½ doz. tablespoons, silverplated	6.00
½ doz. each of knives and folks, silverplated	10.00
1 wool carpet	50.00
1 sewing-machine	50.00
1 wool and cotton carpet	30.00
1 trunk	20.00
Fishing gear, including 2 herring nets	45.00
Set of carpenter tools	10.00
2 kitchen sinks with fittings	18.00
1 porcelain toilet, complete fitted	25.00
pipes and fittings	75.00
1 Howárd watch, 14 carat gold case	90.00
1 double nugget chain for watch	52.00
1 ladies gold watch, Waltham, 17 jewel	60.00
1 ladies watch chain	35.00
1 ladies short nugget chain	15.00
1 wedding ring	10.00
1 man's buckle ring	15.00
1 boy's gold ring	5.00
2 nugget pins	6.00

(Testimony of John Larson.)

1 ladies nugget brooch pin	8.50
Full brass band musical instruments...	750.00
Miscellaneous house furnishings, pictures, decorations, personal toilet articles, trinkets, etc.	100.00
Cash	220.00
Personal clothes for self and child	250.00
Total $3031.00	

(Signed) JOHN RUSTGARD,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

John Larson, being first duly sworn, [36] deposes and says: That he is the plaintiff above named; that he is acquainted with the foregoing bill of particulars, and that the same is correct as he verily believes.

JOHN LARSON.

Subscribed and sworn to before me this —— day of June, 1920.

_____,
Notary Public for Alaska.

My commission expires October 8, 1922.

Service of the above admitted this —— day of June, 1920.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant."

Q. Now what did you do the morning of the second of January, 1920, after you got up?

(Testimony of John Larson.)

A. I went up to Koski's place.

Q. Went up to Koski's place. As I understand it, your house was located just below Koski's house?

A. Yes.

Q. About what time did you go up to Koski's place?

A. That was about twenty minutes after nine.

Q. What did you go up there for?

A. I went for my breakfast; I was boarding over there.

Q. How did you go over to the Koski house from your place? A. I walked over.

Q. Which way did you go into the Koski house?

A. I went in from the front.

Q. You went in from the front. All right. You had your breakfast in there? A. Yes.

Q. How long did you stay in there? [37]

A. I stayed about half an hour or so.

Q. Then what did you do?

A. I went out again, and I went back to my own house there.

Q. Did you see any water anywhere at that time? A. Yes, I saw a little.

Q. Where was the water?

A. It was coming over the bank.

Q. Which bank?

A. That was back of Koski's house.

Q. Where were you when you saw this water?

A. I was coming out from the kitchen door, and I went back to my own house.

(Testimony of John Larson.)

Q. The kitchen door was at the back end of the house then? A. The back end; yes.

Q. All right. Where was this water coming from that you saw coming down there?

A. Coming from up the hill.

Q. Could you see up the hill, the place where it was coming from?

A. I could see a little ways; yes.

Q. About how far up the hill did you see it?

A. Oh, about 50 feet or so.

Q. About how much water did you see there,—can you give us an idea about how wide a stream —how thick—deep?

A. Might be 2 or 3 feet wide.

Q. Now where was it coming with reference to the Koski house,—was it on the side, or the center, or where? A. Right in the center.

Q. And that was about what time in the morning? A. That was about ten minutes to ten.

Q. Then what did you do? [38]

A. I went back to my own house.

Q. How long did you stay in your house before anything happened?

A. I stayed about over an hour.

Q. Stayed about an hour. Then what happened?

A. Then the slide came.

Q. Describe a little bit more in detail as to how it came.

A. Well, I was upstairs and I came down from upstairs, and I came on the second story, and then

(Testimony of John Larson.)

I go in through the door and I shut the door, and then the house went, and I went with it.

Q. What was it that came down. You say the slide came—tell us what it was.

A. Koski's house came right on top of mine.

Q. Did anything else come on top?

A. The steel tower.

Q. The steel tower—did the steel tower come on your house, too?

A. The steel tower was right by Koski's place there.

Q. Did you see the steel tower on Koski's place?

A. No I didn't.

Q. Was there any water anywhere?

A. I didn't see any water that time.

Q. What did you see?

A. I didn't see any—I was inside the house there.

Q. You were inside of the house? A. Yes.

Q. So you didn't have a chance to see it—to look through the window.

A. No, I didn't.

Q. What was the next thing you remember then —what happened to you first? [39]

A. Then after, I went down about 50 feet below the trestle.

Q. You were carried away, as I understand, with the house?

A. Yes, carried in the house. I was on top of the floor. My kitchen floor would be there; there

(Testimony of John Larson.)

was a pile of lumber on top of me, and my one hand was loose and I started to pull some lumber off my head, and I pulled out, and then John Anderson came in and he helped me lift me up.

Q. Describe the material in which you were buried? A. Yes.

Q. What was it? A. Water and mud.

Q. And about how long after the slide did you get out of there?

A. Oh, about a few minutes.

Q. About a few minutes? A. Yes.

Q. All right. Now, I forgot to ask you something more about the house. How many rooms were in that house after you had it built up the way you said you had?

A. I had 16 rooms altogether.

Q. What was that house being used for?

A. Rooming-house.

Q. How long had you used it for a rooming-house? A. Since 1915.

Q. What was that property worth?

Mr. HELLENTHAL.—I object to that as immaterial until he has shown his title.

The COURT.—Well, it seems to me Mr. Roden, that it is immaterial until you establish ownership in this [40] plaintiff.

Mr. RODEN.—I think he has established his life estate, your Honor, and that is sufficient ownership for the purposes of this suit.

Mr. HELLENTHAL.—Established what?

(Testimony of John Larson.)

Mr. RODEN.—Life estate by curtesy.

The COURT.—It depends upon what you are suing for. Let me see the complaint.

Mr. RODEN.—I think the authorities will help me out on that point. Of course the complaint is for the ownership—no question about that.

The COURT.—Your suit is founded, not on injury to the rooming-house business, but it is for the destruction of the premises themselves.

Mr. RODEN.—Yes, his life estate has been destroyed, and he has a right to sue for that—at least I think he has.

The COURT.—Did your wife die before or after the suit was commenced?

The WITNESS.—Died before.

The COURT.—Before this suit was commenced?

The WITNESS.—Yes, before.

The COURT.—This does not say that he is suing for a life estate—it says he is the owner of the property.

Mr. RODEN.—I know it says that. While it is true that the fee simple, the inheritable title does not belong to him, he certainly has an estate by curtesy, and I am quite positive that under those allegations in the complaint he can recover for the estate. It is true that he cannot make out the whole title which he sets up in his complaint—it is true that cannot be done.

(Argument by Mr. Roden.) [41]

(Testimony of John Larson.)

Direct Examination (Continued).

The COURT.—On the question that arose just before we took the recess, I think the plaintiff can recover the value of the estate by curtesy under this complaint; but I think it is the value of the estate that will have to be shown and not the value of the property. Of course, the value of the life estate depends a good deal upon the value of the property, but it is the value of the life estate—

Mr. RODEN.—I understand.

Q. (By Mr. RODEN.) Now, Mr. Larson, I didn't quite get you, before we adjourned, as to when your wife died.

A. She died in 1918; November 18th.

Q. November 18th, 1918 you say?

A. November 18, 1918, yes.

Q. She died in the hospital here, did she?

A. She died of the flu—the first flu that was here.

Q. The time of the flu epidemic in 1918; and you stated you and your wife were living together up to the time she went to the hospital? A. Yes.

Q. Did you see your wife in the hospital?

A. I took her to the hospital—that is the only time I saw her there.

Q. How did it happen that you didn't see her again?

A. They wouldn't let me in there.

Q. Was the hospital quarantined at the time do you know? A. Yes.

(Testimony of John Larson.)

Q. The hospital was quarantined, and that is why you didn't see her again? [42] A. Yes.

Q. There was no trouble of any kind existing between you and your wife? A. No.

Q. At the time you bought this property from Mr. Lund did you pay the money? A. Yes.

Mr. HELLENTHAL.—I object to that as immaterial.

Q. How much was it—how much did you pay him? A. $1200.

Mr. HELLENTHAL.—I object to that as immaterial.

The COURT.—It is preliminary.

Mr. RODEN.—You may answer that question.

The WITNESS.—I paid $1200.

Q. And you stated that you made a lot of improvements there, and made a three story house out of the place? A. Yes.

Q. How much money was paid out to change this house and put it up as it was at the time of the slide?

Mr. HELLENTHAL.—I object to that as immaterial.

The COURT.—Of course that is not the measure of the damage, but it might throw some light on what the value was.

Mr. RODEN.—I understand the measure of damages would be the rental value during his life.

Q. How much money was spent in putting the building in the condition in which it was at the time of the slide?

(Testimony of John Larson.)

Mr. HELLENTHAL.—That is under my objection, your Honor.

The COURT.—Overruled. A. $2600 [43]

Q. And the property which was in the house, the furniture and the fixtures and the cash money, that is in the list that you had this morning, was the property worth what you have said it was worth in that list? A. Yes.

Q. And that was a little over $3,000.

A. Yes.

Q. How much cash money was among that?

A. $220.

Q. What did you use this house for, John?

A. I used it for a rooming-house.

Q. You and your family lived in the house?

A. Yes.

A. And you put it up for a rooming-house, and used it for a rooming-house—how many rooms did you have in the house to rent out?

A. I rented out 8 rooms.

Q. You rented 8 rooms. Did you use the house for any other purpose,—did you carry on a lodging-house there, too?

A. I used it for my own living and for a rooming-house.

Q. Just as a rooming-house? A. Yes.

Q. Can you tell the Court and jury what the rent of this house would bring per month?

A. Well, I generally averaged about $50 or $60 a month, from the rent.

(Testimony of John Larson.)

Q. You got that from the rent? A. Yes.

Q. Did you do any work in the house?

A. Yes. [44]

Q. What work did you do in connection with the rooming-house?

A. Well, I was getting it clean and making beds.

Q. Did you at any time rent your house?

A. Yes, I had a chance to rent it, but I didn't want to rent it out.

Q. You had chances to rent it, did you?

A. Yes, after my wife died, there was two or three parties what wanted to rent it.

Q. Was there any talk between you and these parties as to how much rent they would pay?

A. Yes.

Mr. HELLENTHAL.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—It is too indefinite as to time and place.

Mr. RODEN.—I can make it definite, your Honor.

Q. You say several parties wanted to rent the house from you after your wife died? A. Yes.

Q. About how long after your wife died?

A. Oh, it was about three months after my wife died.

Q. That would be in the early part of 1919, then?

A. Yes.

Q. Was there any time later— A. Yes.

Q. How late was it?

A. About three months after that.

(Testimony of John Larson.)

Q. That would bring you about the middle of 1919? A. Yes.

Q. Was there anybody offered you any rent for the house later than that? [45] A. No.

Q. What offer did you have during this time you have mentioned?

A. I was offered about $40 a month.

Q. About $40 a month. Now, about the time the slide came and destroyed the house, had the rental value of the property changed any,—had it become more valuable for renting, or less?

A. No, the same thing.

Q. I cannot hear you.

A. No, it didn't change.

Q. Was it about the same then? A. Yes.

Q. How old a man are you, John? A. 38.

Q. And I think you stated this morning that you have been in good health? A. Yes.

Q. Never suffered from any serious sickness, have you? A. No.

Mr. RODEN.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You were behind the Koski house after a quarter to ten in the morning, weren't you, when you saw water coming over the bank there?

Mr. RODEN.—Will you excuse me one moment?

Mr. HELLENTHAL.—Yes, certainly.

Mr. RODEN.—I would like to offer in evidence

the bill of particulars that was filed, setting forth the property that was in the house. [46]

The COURT.—It will be received.

Whereupon said bill of particulars was received in evidence, marked Plaintiff's Exhibit "O," and is in form and figures as follows, to wit:

"In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

BILL OF PARTICULARS.

COMES NOW the plaintiff above named, and in response to the request for a bill of particular items of personal property claimed by him in his complaint to have been destroyed and for which destruction he seeks to recover damages from defendant, submits the following:

BILL OF PARTICULARS:

1 range, hot-water connections	$ 70.00
1 range	80.00
3 heaters	31.00

3 full sized bedsteads and bedding	210.00
7 three-quarter size bedsteads and bedding	420.00
5 dressers or bureaus	75.00
1 dresser or bureau	20.00
4 center tables	16.00
1 kitchen table	10.00
5 kitchen chairs	13.50
19 rocking chairs	57.00
1 rocking chair	7.00
1 rocking chair	10.00
1 couch	16.00
1 couch	14.00
Cooking utensils	15.00
Plated dishes, etc.	25.00
1 doz. silver plated teaspoons	6.00
½ doz. tablespoons, silverplated	6.00
½ doz. each of knives and forks, silver-plated	10.00
1 wool carpet	50.00
	$1,141.50

[47]

Forwarded	$1,141.50
1 sewing-machine	50.00
1 wool an dcotton carpet	30.00
1 trunk	20.00
Fishing gear, including 2 herring nets	45.00
Set of carpenter tools	10.00
2 kitchen sinks with fittings	18.00
1 porcelain toilet, complete fitted	25.00

Pipes and fittings	75.00
1 Howard watch, 14 carat gold case	90.00
1 double nugget chain for watch	52.00
1 ladies gold watch, Waltham, 17 jewel	60.00
1 ladies watch chain	35.00
1 ladies short nugget chain	15.00
1 wedding ring	10.00
1 man's buckle ring	15.00
1 boy's gold ring	5.00
2 nugget pins	6.00
1 ladies nugget brooch pin	8.50
Full brass band musical instruments	750.00
Miscellaneous house furnishings, pictures, decorations, personal toilet articles, trinkets, etc.	100.00
Cash	220.00
Personal clothes for self and child	250.00
Total	$3,031.00

(Signed) JOHN RUSTGARD,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

John Larson, being first duly sworn, deposes and says: That he is the plaintiff above named, that he is acquainted with the foregoing bill of particulars, and that the same is correct as he verily believes.

JOHN LARSON.

(Testimony of John Larson.)

Subscribed and sworn to before me this —— day of June, 1920.

_____,

Notary Public for Alaska.

My commission expires October 8, 1922.

Service of the above admitted this —— day of June, 1920.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant.'' [48]

Q. (By Mr. HELLENTHAL.) That was about a quarter to ten, wasn't it, when you were there?

A. A quarter to or ten minutes to ten.

Q. Yes, about that time? A. Yes.

Q. A little before ten o'clock? A. Yes, sir.

Q. Between half-past nine and ten? A. Yes.

Q. At that time you saw some water coming over the bank behind the Koski house? A. Yes, I did.

Q. That water, was that clear or muddy—was it clear water or muddy water?

A. At the time I didn't look much—I only saw the water coming, and I was busy there at my own house, and I only noticed that water was coming there.

Q. There wasn't much water at that time?

A. No, there wasn't much.

Q. Not enough for you to stop and look at it?

A. Yes.

Q. I say there wasn't enough for you to stop and look at it—that is true? A. Yes, I seen it there.

(Testimony of John Larson.)

Q. You saw water but you didn't pay much attention to it? A. No.

Q. Because there wasn't very much—that is right, isn't it?

A. There was about two or three feet wide, the stream was, coming down.

Q. It wasn't big enough for you to stop—I mean to pay attention to it,—you didn't think much of it at that time, I mean?

A. No, I didn't pay any attention to it. [49]

Q. Did you see the rocks sliding down on the sidewalk at that time?

A. No, I didn't.

Q. Some muck and rocks come down? A. No.

Q. You didn't notice it?

A. I didn't notice that.

Mr. HELLENTHAL.—That is all.

Direct Examination.

(By Mr. RODEN.)

Q. Mr. Larson, while your wife was alive who transacted all the business in connection with your rooming-house? A. I myself.

Q. You did? A. Yes.

Q. Who ordered and bought the stuff?

A. I did.

Q. Who paid for it? A. I did.

Q. At the time your wife died do you know whether or not she left any debts? A. No.

(Testimony of John Larson.)

Q. Has anybody ever presented a bill to you made by your wife? A. No.

Q. Do you know whether anybody has ever applied to the probate court to have an administrator appointed? A. No.

Q. Nobody ever has? [50]

No other or further evidence was adduced at the trial tending to prove the extent of the injuries of the amount of the damages alleged to have been sustained by reason of the matters and things set forth in the complaint or otherwise, nor was there any other or further evidence tending to prove the value of the articles of property alleged in the complaint to have been injured or destroyed. The plaintiff, before the cause was submitted, voluntarily withdrew that portion of the complaint relating to injury or damage caused to the real property referred to in the complaint and confined his demand for damages to the injury sustained to the personal property referred to in the complaint. After all the evidence was in, and both sides had rested their cause, the defendant made a motion for a directed verdict, which is in words and figures as follows: [51]

In the District Court for the District of Alaska, Division No. One, at Juneau.

Case No. 1449–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Motion to Direct Verdict.

Comes now the defendant and moves the Court to direct a verdict in favor of the defendant on the following grounds, to wit:

I.

That there is no evidence before the Court that the defendant was negligent in any respect whatsoever.

II.

That there is no evidence that the defendant was negligent in relation to any of the matters or things charged in the complaint or bill of particulars; but, on the contrary, the evidence shows that the defendant at all times referred to in the complaint and pleadings herein was in the exercise of the highest degree of care.

III.

That the evidence conclusively shows that water coming from the defendant's penstock or other

part of the defendant's flume or diverting works was not the proximate cause of the injury complained of, or the resulting damage; that the evidence conclusively shows that said water could not have flowed in the direction of the slide area, but for the intervention of an independent, intervening cause; that there is no evidence that the defendant was responsible for any obstruction to the natural drainage along which water would have drained to Portal Gulch, had it not been for such obstruction, whatever it might have been; that the evidence conclusively shows that the waters coming from the penstock, if any, [52] would have drained to Portal Gulch and not to the slide area, had it not been for some obstruction; and that there is no evidence of what such obstruction consisted, and especially no evidence that the defendant was responsible for its existence, whatever it may have been; or that it was such that the defendant should have anticipated or provided against. Furthermore, the evidence conclusively shows that if it had not been for the existence of the trail leading down the ridge in the direction of the slide area the water would have left the ridge and drained in the direction of one or the other of the two gulches that exist on either side of the ridge; and that there is no evidence that the defendant was responsible for the existence of said trail or for the fact that said trail carried the water, instead of permitting the same to follow the line of natural drainage.

IV.

That there is no evidence of damage sufficient to enable the jury to find a verdict in favor of the plaintiff, or to assess the plaintiff's damages, if any, or to base a verdict for damages upon.

V.

That there is no evidence of any of the matters or things charged in the complaint sufficient for the jury to find a verdict in favor of the plaintiff.

HELLENTHAL & HELLENTHAL,
Attorneys for the Defendant. [53]

And the Court, having duly considered the same, denied said motion, to which ruling and order of the Court the defendant by counsel then and there excepted; whereupon the court instructed the jury as follows: [54]

Instructions of Court to the Jury.

Gentlemen of the Jury:

This is an action brought by John Larson for the recovery of compensation for damages alleged to have been sustained by him by reason of a slide which occurred in the city of Juneau on the second day of January, 1920. The plaintiff alleges that the slide was occasioned by water escaping from the ditch, flume or penstock of the defendant company and running down the slope of the hill. It is claimed that the said water so escaped and ran down the hill by and through the negligence of the defendant.

It is established that plaintiff was damaged by the slide of January 2, 1920.

It is the contention of plaintiff that water escaping from the ditch, flume or penstock of defendant was a proximate cause of the slide which did the damage; while defendant contends, 1st, that no water in any appreciable amount escaped from the flume or penstock prior to the slide; 2d, that even if any such water did escape, yet such water was not a proximate cause of the slide.

PROXIMATE CAUSE.

What is meant in law when one thing is said to be the cause of another? In one sense all things that go before are the cause of all things that come after, for all things that go before combine in some degree, infinitesimal though it may be, to produce the things that come after; but in law no such refinement can be indulged in for the law does not consider remote causes but only proximate causes, that is, near causes—near in point of potency—efficient causes. The law considers that to be a proximate cause which is an efficient cause—one that necessarily sets the other causes in operation. No event can be said to be the proximate cause of a subsequent event unless that subsequent event would not have happened if the particular event had not already happened.

So the first question that should present itself to you would be, did any water escape from the ditch, flume or penstock prior to [55] the landslide?

If you answer that in the affirmative, then you take up the question whether or not the escaping water was a proximate cause of the slide. In determining this question you should take into consideration what was the state of affairs existing at the time the water escaped, if it did escape; then consider how much water escaped, and where it flowed to, and what effect, if any, it had on the then existing state of affairs—all as shown by the evidence, for you cannot go beyond the evidence. If the water escaping (provided any such did escape) before the slide was of small quantity or force, and so little affected the then existing state of affairs that the slide would have occurred even if the water had not escaped, then the escaping water, if any, was not a proximate cause of the slide. On the other hand, if you find from the evidence that the escaping water, if any, was of such amount and force and so placed that acting upon the then existing state of affairs the slide was produced by its material assistance, and would not have happened but for that assistance, then the water was a proximate cause of the slide.

One thing may be a proximate cause and yet not the sole cause, for there may be more than one proximate cause. An occurrence may be the result of several happenings, each one materially contributing to bring about that event, but when that is the case no one of those things is a proximate cause of a particular result unless that result would

not have happened if that one supposed cause had not already happened.

In order to find that water flowing from the penstock, if any, was the cause of the slide it would not be essential that such water alone and unaided by other forces caused the slide, but it would be necessary that the said water was one of the material agencies in producing the slide and that such slide would not have occurred unless the water escaping from the flume did flow over the area of the slide. [56]

The burden of proof to show that the escaping water, if you find that any water escaped before the slide, was a proximate cause of the slide, is on the plaintiff—that is to say, if the plaintiff would have you believe that this slide was caused by water escaping from the ditch, penstock or flume, he must produce (or rather there must have been produced in the case) stronger, weightier, more convincing evidence that the water was a proximate cause than the defendant would have to produce that the water was not a proximate cause.

If you do not find from a preponderance of the evidence that water escaping from the ditch, flume or penstock was a proximate cause, you should find for the defendant irrespective of any other considerations.

I have been directing your attention solely to the question of proximate cause of the slide, for the cause of the slide must be determined before you

would be in a position to say whether or not defendant is liable.

I come now to the question of liability. If in your opinion the preponderance of the evidence shows that water escaping from the flume or penstock was a proximate cause of the slide, you should then determine whether or not the water was permitted to escape through the negligence of the defendant, for the gist of this action is negligence.

Now, the defendant company had a right to divert the waters of Gold Creek and bring them around the mountain and utilize them by means of flume, ditch, penstock and pipe lines in the running of its mill. In doing this it is not an insurer against the infliction of damage. It is not liable for damages which may result from its so diverting the water if such work be done with ordinary care. While it has this right, however, to divert the waters of Gold Creek by bringing them around the mountain, yet if in so doing it negligently permits water to escape and cause damage, it is liable for the damage caused thereby, if any. [57] The second question, then, for you to consider is this: Was the escape of the water, if any water escaped before the slide, due to the negligence of the company in any of the particulars alleged in the complaint?

Negligence is the absence of that degree of care which an ordinarily prudent person having due regard for the welfare, the safety and the rights of

others would exercise under the circumstances of the particular case being inquired of. Now, the degree of care which an ordinarily prudent person would exercise in any given case is proportioned to the dangers reasonably to be apprehended and guarded against in the light and the view of all the circumstances and of the consequences if such dangers culminate in some untoward event.

In this case the particulars of negligence alleged by the plaintiff, and which particulars, or some of them at least, he must show by a preponderance of the evidence, are as follows, that is to say: Plaintiff alleges that "by constructing and maintaining a flume or conduit to confine ad carry away to some safe place any water which at any time, for any reason, might be conveyed to the penstock in excess of what the distribution pipe would, could or did carry away, no water carried to the penstock could or would have overflowed or been deposited upon the slope or premises in question, or otherwise occasioned any damage." He further alleges "that ordinary and reasonable care and caution on the part of the defendant required of it that it should have constructed and maintained at all times such waste flume to carry away such waste or surplus water, and that defendant was negligent in not providing such protection against injury from surplus or overflowing water at or near the penstock." Plaintiff further alleges that "defendant was negligent in that it failed to provide and maintain a

series of spillways along its flume by which spillways surplus water could and would be released from the flume before it reached the penstock." He further alleges that the overflow water of which he complains and which he alleges [58] caused the damage herein complained of "was known to the defendant to be so flowing and likely to cause said damage long prior" to the occurrence of the slide complained of, or would, by the exercise of reasonable care on the part of the defendant have been "known to it long prior to the said slide and prior to any damage that would have been done by the said water." He further alleges "that defendant was negligent in not shutting off said water and preventing said overflow before any damage was occasioned thereby," and that it "wrongfully and unlawfully permitted the said water to flow upon the said premises."

Now, it is for you to say, from the evidence in this case, what, if any, dangers would have been reasonably anticipated by the ordinarily prudent man as likely to arise; and then it is for you to determine, also, what, if any, precautions an ordinarily prudent man would have taken under the circumstances to avert the dangers that could be reasonably anticipated, and then if there are any precautions which the ordinarily prudent man would have taken, it is for you to say whether or not the defendant did take such precautions. Defendant would be held to the duty of taking such precautions

as the ordinarily prudent man would take against the dangers which an ordinarily prudent man would anticipate as being likely to arise. It would not be held to the duty of taking any more precautions. If, for instance, an ordinarily prudent man under the circumstances would have deemed it a wise or necessary precaution, or one called for under the circumstances, to build a waste pipe or conduit or spillways to catch any overflow water that might escape from the penstock or flume, then the defendant should have taken such precaution. If, on the other hand an ordinarily prudent man would have considered that under the circumstances there was either no danger that the water would overflow at the penstock, or if so, that it would do any damage if it did overflow, then the defendant could not be held to liability for not building sich waste pipe, conduit or spillways. [59]

In short, did the defendant in this regard do or omit to do anything which an ordinarily prudent person would not have done or omitted to do, as the case may be, under the circumstances? If the answer is in the affirmative, then the defendant was negligent just in so far as it failed to lvie up to the standard which an ordinarily prudent man would set for himself. If the answer is in the negative, the defendant was not negligent.

To state again, essentially negligence is not the absence of high care nor the presence of low care or of no care, but it is the absence of that care which an ordinarily prudent person would exercise under the circumstances. Under some circumstances an

ordinarily prudent person would exercise a high degree of care, and under other circumstances he would not be so careful,—it is for you to say, from the evidence, what the circumstances were,—that is, what the conditions were, what the dangers to be apprehended were, what precautions were wise or necessary to be taken, and what care an ordinarily prudent person, bearing all these things in mind, would have taken, and whether or not the defendant exercised that amount of care.

Negligence is never presumed. It must be proved by a preponderance of evidence, and it must also be proved by a preponderance of the evidence that the negligence proven, if any, was the cause of the disaster complained of in any given case—that is to say, plaintiff cannot recover on the score of negligence unless it appears from the preponderance of the evidence that at least one particular of the negligence complained of existed, and he will have to prove in addition that that particular act of negligence was the proximate cause of the injury proven, if any.

The fact, if it be a fact, that before the escape of the water Koski or his predecessors made an excavation in the bank or hill and that the slide would not have occurred but for that excavation, will not excuse the defendant if the escape of the water was a proximate cause, as I have defined proximate cause, and if that escape was due to the negligence of the defendant, as I have [60] defined negligence, provided you find that the slide would not have been produced at all had it not

been for the negligent act of the defendant.

Of course, if the said cut in the bank, either alone or combining with natural causes over which the defendant had no control, produced the slide, the defendant would not be liable; but if the cut in the bank and natural causes, combined with the negligent act of the defendant in allowing water to escape from its penstock, if you find that any such water did escape, and that its escape was due to negligence,—I say, if all these things combined produced the slide, and if the slide would not have been produced except for the said negligent act, if you find it was a negligent act, then the defendant would not be liable, and your verdict should be for plaintiff.

To make the matter a little plainer, Gentlemen, where a cause produced by a negligent act of a defendant combines with causes for which the defendant is not responsible to produce a casualty, the law does not consider the negligent act as the proximate cause of the casualty unless it be true that the casualty would not have been produced except for that negligent act, and that an ordinarily prudent man under all the circumstances would have known or should have known that a casualty might result from that negligent act.

Applying that principle of law to this case, you are instructed that if you find that water escaped from the flume due to the negligence of the defendant and materially contributed to produce the slide, but that an excavation or excavations and the rains and the snows and other conditions for which the

defendant is not responsible, also contributed to produce the slide, you cannot find a verdict against the defendant unless you also find that the slide would not have been produced except for the escaping water and that an ordinrily prudent person would have known or should have known that the natural and probable consequences of the escape of the water would have been to produce a slide or like casualty. [61]

You are the sole judges of the weight of the testimony and the credibility of the witnesses. You must decide the case on the evidence and the instructions of the Court, and not take into consideration any extraneous matters. You are to decide the case without fear or favor or sympathy. If the water was the cause of the slide and defendant was negligent, it is but meet and proper that it should compensate the plaintiff for the damage inflicted. If water escaping from the defendant's flume or penstock was not the cause of the slide, or if the defendant was not negligent in the particulars pointed out in the complaint and bill of particulars, then it would be manifestly unjust to take money out of its pocket to compensate the plaintiff for damages which did not arise from its delinquency.

You make up your minds which witnesses are to be believed when they testify in court much the same as you do when they tell you a story outside of court—you size up the witness—you observe his appearance and demeanor—you note whether he is frank and candid—whether he has shown a disposition to tell the truth, the whole truth, about the mat-

ters of which he has testified; you consider how he stood cross-examination; you consider what interest he has in the story told and whether or not that interest has colored his testimony, and if so, to what extent; and from all the facts and circumstances appearing in the case make up your mind whom to believe and what to believe.

In this case expert testimony has been introduced on both sides. You should weigh the testimony of expert witnesses in the same manner as you weigh that of other witnesses,—that is to say, you are not bound to believe any expert unless his testimony seems reasonable under the circumstances. When matters beyond the ken of ordinary observation and experience matters requiring special or technical knowledge arise, experts are called who are specially versed in those matters—they give their opinions for their reasons, and you weigh the whole matter. After all, it is what you believe that testimony is and what inferences you think ought to be drawn from it, that controls. [62]

Arguments of counsel are not evidence. It is meet and proper that they should give their recollection of the evidence, and state the inferences which they think you should draw from that evidence, but as said before, it is your recollection of the evidence and your judgment as to the inferences which are to govern your verdict.

If your verdict should be for the plaintiff it should be for such sum as you may find from the evidence he has been damaged as the direct, natural and probable consequences of the slide. You can-

not allow anything by way of punitive damages or smart money. You have nothing to do with the costs in this case one way or the other.

There is a claim made for $3,800, the alleged value of the real estate. In that connection you are instructed that plaintiff has shown that he has only a life estate in the real estate, and no evidence has been introduced as to what was or is the value of that life estate. Consequently, you cannot allow any sum for the loss or destruction of the house and lot. If you allow damages the sum allowed must be limited to such sum as is the fair market value of the personal property which you may find from the evidence has been lost or destroyed. Plaintiff alleges that his loss in that regard is $3,020. If you find for plaintiff, you will determine from the evidence what articles were lost, and if any such were lost, then the value thereof.

If you find a verdict in this case you will answer the following questions:

(1) Was water escaping from the ditch, flume or penstock a proximate cause of the slide?

(2) Was the defendant negligent in any of the particulars set forth in the complaint and bill of particulars?

(3) If so, in what did that negligence consist?

You will elect one of your number as foreman and he will sign the form of verdict that you may agree upon. You will be handed two forms of verdict, one in favor of plaintiff and one [63] in favor of the defendant. The verdicts speak for themselves, so it will be easy for you to determine

which one applies, according as your decision may be.

To which instructions so given by the Court the defendant at the time the instructions were given and before the jury retired, duly and regularly made the following objections and took the following exceptions:

> "Defendant objects and excepts to that portion of the charge relating to the amount that could be assessed, or the measure of damages, as there is no evidence that will enable the jury to determine the market value of the articles of property which it is claimed were lost or destroyed, the evidence on this question being wholly lacking, and in other respects insufficient to enable the jury to assess any damages or arrive at the question of market value."

which exception was then and there allowed by the Court; whereupon the jury retired to deliberate of their verdict, and having agreed upon a verdict, returned to the court a verdict which is in words and figures as follows:

"In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Verdict.

We, the jury duly empanelled and sworn in the above-entitled cause, do find for the plaintiff, and assess the amount of his recovery at $1,510.00.

Dated at Juneau, Alaska, May 8, 1921.

DAVID WAGGONER,
Foreman." [64]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Certificate of Judge Allowing and Settling Bill of Exceptions.

This matter coming on to be heard on the motion of the Alaska Juneau Gold Mining Company to settle and allow the above and foregoing bill of exceptions herein, and it appearing that the above and foregoing cause came on regularly for trial before the Honorable Robert W. Jennings, the then Judge of this court, at the time and place mentioned in the foregoing bill of exceptions, and that the proceedings therein set forth were duly had, and that the proceedings had upon the said trial were

duly reported and recorded by the court stenographer and the stenographic notes thereof were duly kept, and that the foregoing bill of exceptions is a true, accurate and correct statement of all that occurred at the trial of said cause and contains all the evidence adduced at the said trial which proved or tended to prove the injuries complained of, or the damages sustained, and all the evidence which proved or tended to prove the value of the property alleged to have been either injured or destroyed. it being agreed by both parties, in open court, that the foregoing recital of what said bill of exceptions contains is true and correct, and that the said bill of exceptions in all respects speaks the truth.

Said bill of exceptions is hereby settled and allowed by me, the undersigned Judge of the District Court for the Territory of Alaska, Division No. 1, and successor to the said Honorable Robert W. Jennings. [65]

And I further certify that the said bill of exceptions was duly presented to the Court within the time allowed therefor, and it is ordered that the same so settled and allowed is made a part of the record in this cause.

Done in open court this 31st day of October,1921.

T. M. REED,
Judge. [66]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

In the United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1949–A.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

Petition For Writ of Error.

To the Honorable ROBERT W. JENNINGS, Judge of the District Court, for the Territory of Alaska, Division Number One:

Comes now the above-named Alaska Juneau Gold Mining Company, a corporation, the plaintiff in error herein, by its attorneys, Hellenthal & Hellenthal, and complains that in the record and proceedings had in the District Court for the Territory of

Alaska, Division Number One, in Case No. 1949–A, John Larson, plaintiff and defendant in error, against the Alaska Juneau Gold Mining Company, defendant, and plaintiff in error, and also the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, against Alaska Juneau Gold Mining Company on the 14th day of May, 1921, wherein the District Court for the Territory of Alaska adjudged the defendant, the Alaska Juneau Gold Mining Company to be indebted to the plaintiff John Larson in the sum of $1,510.00, and therein the plaintiff John Larson was given judgment against the defendant, the Alaska Juneau Gold Mining Company for the sum of $1,510.00 and [67] costs taxed at $170.75 manifest error hath happened to the great damage of said Alaska Juneau Gold Mining Company as will more fully appear from the assignment of errors filed herewith.

WHEREFORE the Alaska Juneau Gold Mining Company prays for the allowance of a writ of error, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 13th day of July, 1921.

HELLENTHAL & HELLENTHAL,

Attorneys for the Alaska Juneau Gold Mining Company.

Copy received.

HENRY RODEN,

Attorney for John Larson.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ————, Deputy. [68]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error and Fixing Amount of Supersedeas and Cost Bond.

This matter coming on to be heard on the petition of the Alaska Juneau Gold Mining Company for a writ of error, the assignment of errors having been regularly filed with said petition, the writ of error is hereby allowed as prayed for in said petition and the amount of the supersedeas and cost bond is fixed at two thousand dollars, to be approved by the court or the clerk thereof.

Dated this 13th day of July, 1921.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ————, Deupty.

Entered Court Journal, No. D, page 105. [69]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, the Alaska Juneau Gold Mining Company, a corporation, as principal, and L. S. Ferris, as surety, are held and firmly bound unto the above-named John Larson in the just and full sum of Two Thousand Dollars ($2,000.00), to be paid to the said John Larson, his attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of July, 1921.

WHEREAS, lately in the District Court for the Territory of Alaska, Division Number One, in an action therein pending between John Larson as plaintiff, and the Alaska Juneau Gold Mining Company, as defendant, a judgment was rendered against the said Alaska Juneau Gold Mining Company for the sum of $1,510.00 and costs, and the said Alaska Juneau Gold Mining Company having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the [70] aforesaid action and the citation directed to the said John Larson, citing and admonishing him to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, within thirty days from the date of approval of this bond.

NOW, the condition of the above obligation is such that if the said Alaska Juneau Gold Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then and in that event the above obligation to be void; otherwise to remain in full force and virtue.

ALASKA JUNEAU GOLD MINING COMPANY,

By SIMON HELLENTHAL,

Its Attorney,

Principal.

L. S. FERRIS,

Surety.

Signed, sealed and delivered in the presence of:

W. B. SHARPE.

A. B. VAN ZANDT.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ————, Deupty.

Approved, July 13, 1921.

J. W. BELL,
Clerk. [71]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable ROBERT W. JENNINGS, Judge of the District Court for the Territory of Alaska, Division Number One, GREETING:

Because of the record and proceedings, as also in the rendition of the judgment of a plea, which is in said District Court, Division Number One thereof, before you, between John Larson, as plaintiff, and the Alaska Juneau Gold Mining Company, a corporation, as defendant, a manifest error hath happened to the great prejudice and damage of the said Alaska Juneau Gold Mining Company as set forth and appears by the petition herein.

We, being willing that error, if any hath [72] happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at said place and said Circuit on or before thirty days from the date hereof that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what

of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this —— day of July, A. D. 1921.

Attest my hand and seal of the District Court for the Territory of Alaska, Division Number One, at the Clerk's office at Juneau, on the day and year last above written.

[Seal] J. W. BELL,
Clerk of the District Court for the Territory of Alaska, Division Number One.

Allowed this 13th day of July, A. D. 1921.

ROBERT W. JENNINGS,
Judge.

Copy received.

HENRY RODEN,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ————, Deputy. [73]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

Citation on Writ of Error.

The President of the United States to John Larson, the Above-named Plaintiff, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty (30) days from the date of this Citation, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, wherein the Alaska Juneau Gold Mining Company, a corporation, is the plaintiff in error and you, the said John Larson, are the defendant in error, to show cause, if any there by, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to [74] the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 13th day of

July, A. D. 1921, and of the Independence of the United States the 145th.

ROBERT W. JENNINGS,
Judge.

Copy received.

HENRY RODEN,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ————, Deputy. [75]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,
Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant.

Order Extending Time Sixty Days to Forward Record on Appeal to U. S. C. C. A. (Dated July 13, 1921).

On motion of Hellenthal & Hellenthal, attorneys for the above-named defendant, made in open court, and it appearing to the Court that the bill of exceptions in the above-entitled cause cannot be settled and the transcript on appeal in said cause can-

not be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within thirty days from the date of the citation herein,—

IT IS ORDERED that sixty days' additional is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 13th day of July, 1921.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By————, Deputy.

Entered Court Journal No. D, page 105. [76]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Order Extending Time Ninety Days to Forward Record on Appeal to U. S. C. C. A. (Dated September 7, 1921).

On motion of Hellenthal & Hellenthal, attorneys

for the defendant above-named made in open court, and it appearing to the court that the bill of exceptions in the above-entitled cause cannot be settled and the transcript on appeal in this case cannot be had out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and the extension granted in July,—

IT IS ORDERED that ninety days' additional time from the date hereof is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 7th day of September, 1921.

ROBERT W. JENNINGS,
Judge.

O. K.—RODEN & DAWES.

Filed in the District Court, District of Alaska, First Division. Sept. 7, 1921. J. W. Bell, Clerk. By V. F. Pugh, Deputy.

Entered Court Journal No. Q, page 319. [77]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,
Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant.

Order Extending Time Forty Days to Forward Record on Appeal to U. S. C. C. A. (Dated November 22, 1921).

On motion of Hellenthal & Hellenthal, attorneys for the defendant above-named made in open court, and it appearing to the Court that the transcript on appeal in this case cannot be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and the extension granted,—

IT IS ORDERED that forty days' additional time from the date hereof is hereby granted in order to forward and file the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 22d day of November, 1921.

THOS. M. REED,
Judge.

O. K. —HENRY RODEN.

Filed in the District Court, District of Alaska, First Division. Nov. 22, 1921. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. Q, page 419. [78]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Order Extending Time to and Including January 10, 1922, to Forward Record on Appeal to U. S. C. C. A.

On motion of Hellenthal & Hellenthal, attorneys for the defendant above-named made in open court, and it appearing to the Court that the transcript on appeal in this case cannot be made out in time to reach the Circuit Court of Appeals for the Ninth Circuit at San Francisco within the time granted in the citation and extension granted,—

IT IS ORDERED that an extension of time to and including January 10, 1922, is hereby granted in order to forward the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 16th day of December, 1921.

THOS. M. REED,
Judge.

O. K.—RODEN.

Filed in the District Court, District of Alaska, First Division, Dec. 16, 1921. John H. Dunn, Clerk. By L. E. Spray, Deputy. [78–A]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

In the United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1949–A.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN LARSON,

Defendant in Error.

Assignment of Errors.

Comes now the Alaska Juneau Gold Mining Company, the plaintiff in error, and assigns the following errors committed by the Court in connection with the trial and rendition of judgment herein,

the errors so assigned being the errors which the plaintiff in error intends to urge before the United States Circuit Court of Appeals for the Ninth Circuit, and are the errors relied upon for a reversal of the judgment herein:

FIRST ERROR ASSIGNED.

The Court erred in denying the defendant's motion for a directed verdict.

SECOND ERROR ASSIGNED.

The Court erred in instructing the jury as follows:

> "If your verdict should be for the plaintiff it should be for such sum as you may find from the evidence he has been damaged as the direct, natural and probable consequences of the slide. You cannot allow anything by way of punitive damages or smart money. * * * If you allow damages the sum allowed must be limited to such sum as is the fair market value of the personal property which you may find from the evidence has been *lost destroyed.* Plaintiff alleges that his loss in that regard is $3,020. If you find for plaintiff you will be determining from the evidence what articles were lost, and if any such were lost, then the value thereof."

HELLENTHAL & HELLENTHAL,
Attorneys for the Alaska Juneau Gold Mining Company.

Copy received.

HENRY RODEN,
Attorney for Plaintiff.

Filed in the District Court for the District of Alaska, First Division. July 13, 1921. J. W. Bell, Clerk. By ————, Deputy. [79]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

Kindly prepare certified copies for transmission to the Circuit Court of Appeals in connection with your return on the writ of error herein, as follows: Complaint and bill of particulars, answer, reply, bill of exceptions, petition for writ of error, order allowing writ of error and fixing amount of supersedeas bond, supersedeas bond and order approving same, writ of error, citation, orders extending time and assignments of error.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division, Nov. 8, 1921. John H. Dunn, Clerk. By L. E. Spray, Deputy. [80]

Certificate of Clerk U. S. District Court to Transcript of Record.

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached eighty-one pages of typewritten matter, numbered from one to 80, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for plaintiff in error on file in my office and made a part hereof, in cause No. 1949–A, wherein Alaska Juneau Gold Mining Company, a corporation, is defendant and plaintiff in error, and John Larson is plaintiff and defendant in error.

I further certify, that the said record is by virtue of a writ of error and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to the sum of Thirty-seven and 20/100 Dollars (37.20) has been paid to the counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 16th day of December, 1921.

[Seal] JOHN H. DUNN,
Clerk.

By ————————————,
Deputy. [81]

[Endorsed]: No. 3815. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff in Error, vs. John Larson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed December 27, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy.

Certificate of Clerk U. S. District Court to Original Judgment.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, the undersigned, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the hereto attached is a full,

true and correct copy of the original Judgment in cause No. 1949–A, entitled John Larson, Plaintiff, vs. Alaska Juneau Gold Mining Company, a Corporation, Defendant. This certificate and paper to complete the transcript of the record on appeal in the above-entitled cause on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said Court at Juneau, Alaska, this fourth day of January, 1921.

[Seal] JOHN H. DUNN,
Clerk.

By ————————————,
Deputy. [82]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1949–A.

JOHN LARSON,
Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant.

Judgment.

This cause came regularly on for trial on the 20th day of April, 1921, the plaintiff appearing in person and by his attorneys, Messrs. Roden & Dawes, and the defendant appearing by its attor-

neys, Messrs. Hellenthal & Hellenthal. A jury consisting of twelve qualified citizens of the United States of America and residents of the Territory of Alaska was duly empaneled and sworn to try the said action. Witnesses on behalf of plaintiff and defendant were sworn and examined and thereafter, having heard the evidence, the arguments of counsel and the instructions of the Court, the jury retired to consider their verdict and subsequently returned into court and filed with the clerk their verdict, which was for the plaintiff and against the defendant and in the words and figures as follows, to wit:

"In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury duly empanelled and sworn in the above-entitled cause, do find for the plaintiff, and assess the amount of his recovery at $1,510.00.

Dated at Juneau, Alaska, May 8th, 1921.

DAVID WAGGONER,

Foreman."

And the Court having submitted special questions

to the jury, the jury also returned a special verdict in favor of the plaintiff, which was as follows, to wit: [83]

"In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1949–A.

JOHN LARSON,

Plaintiff,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

ANSWERS TO QUESTIONS PROPOUNDED TO JURY.

We, the jury duly empanelled and sworn, in the above-entitled cause, to answer the special interrogatories propounded to us as follows:

1. Was water escaping from the ditch, flume or penstock a proximate cause of the slide?

Answer: Yes.

2. Was the defendant negligent in any of the particulars set forth in the complaint?

Answer: Yes.

3. If so, in what did that negligence consist?

Answer: By not constructing a ditch, flume or pipe to carry off any overflow of water from pen stock to a place of safety.

DAVID WAGGONER,

Foreman."

And the time for filing a motion for a new trial having expired and it now appearing to the Court

that judgment should be entered in favor of the plaintiff and against the defendant, it is now:

ORDERED AND ADJUDGED that the plaintiff, John Larson, do have and recover of and from the defendant, Alaska Juneau Gold Mining Company, a corporation, the sum of One Thousand Five Hundred Ten ($1,510.00) Dollars, with interest thereon at the rate of 8% per annum from the date hereof until paid, together with his costs and disbursements herein expended taxed by the clerk.

Sixty days are allowed to prepare and file a bill of exceptions and stay of execution for said sixty days is hereby *stayed.*

Dated at Juneau, Alaska, this 14th day of May, 1921.

ROBERT W. JENNINGS,
District Judge.

Filed in the District Court, District of Alaska, First Division. May 14, 1921. J. W. Bell, Clerk. By ————, Deputy.

Entered Court Journal No. Q, pages 272, 273. [84]

[Endorsed]: No. 3815. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Juneau Gold Mining Company, a Corporation, Plaintiff in Error, vs. John Larson, Defendant in Error. Certified Copy of Judgment. Filed Jan. 12, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.